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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1195.

THE JUSTICES OF THE SUPERIOR COURT
OF MASSACHUSETTS,
PETITIONERS,

v.

KENNETH JACKSON ET AL.,
RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Reply Brief.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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The Issue Presented In This Cross-Petition Involves An Actual Controversy Appropriate For Resolution By This Court.

Respondents assert that cross-petitioners are seeking an advisory opinion from this Court on the question of whether the federal District Court abused its discretion by ordering a stay of state criminal proceedings.

In the classic sense, the rule against advisory opinions is applied "[w]hen the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government." *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968). No such question, of course, is involved here. Nevertheless,

> "the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97.

The issue of the propriety of a federal court staying state court proceedings is both capable of, and indeed appropriate for, judicial resolution. It involves parties who are fully adversary. The issue is fully suitable for judicial resolution, and there is a genuine need for such resolution. It is "the kind of controversy courts traditionally resolve." *United States* v. *Nixon*, 418 U.S. 683, 696 (1974).

At issue is the Commonwealth's right to proceed with the pending criminal trials of well over 80 defendants. The Commonwealth's interest in proceeding against those indicted is opposed by the respondents' interest in preventing trials in the Superior Court on those indictments. This setting assures that there is "'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U.S., at 204." *United States* v. *Nixon*, *supra*, at 697.

Respondents to this cross-petition allege that petitioners seek only an advisory opinion. Respondents assert the proposition that an actual controversy and, therefore, a justiciable issue have been presented only if this Court could avoid a decision on the merits by deciding that the stay was improper. For this proposition, respondents cite no authority and petitioner suggests that there is none.

However, respondents do appear to find some authority for this proposition in the manner in which the Court has resolved certain cases involving preliminary injunctions and petitions for declaratory relief. Since both issues in those instances rest upon equitable considerations, decision upon one issue will, most often, merge or control decision on the other. *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975).*

The instant case does not present such a situation. Two separate issues are involved here: one, a matter of equitable restraint; the other, a question of law. Clearly, resolution of each issue is based upon separate considerations.

Therefore, it is quite clear that determination of the propriety of the issuance of the stay will not be rendered moot, nor constitute no more than an advisory opinion, by this Court's resolution of the merits of this case, if certiorari is granted in Case No. 76-6200. For example, the Court may always find, after argument, that certiorari was improvidently granted if, for instance, the issue of the retroactivity

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* *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), cited by petitioners, has no application to the case at bar. Nor does it stand for the proposition that this Court is foreclosed from considering both the merits of the case and the propriety of the stay. *Cohen* dealt with the question of whether there was a right of appeal under 28 U.S.C. § 1291 from an order of the federal District Court denying a corporation's motion to require a shareholder to post security in a derivative action. Section 1291 concerns the jurisdiction of the Court of Appeals, not the Supreme Court of the United States.

of *Breed* v. *Jones*, 421 U.S. 519 (1975), is deemed not ripe for adjudication. Moreover, disposition on the merits itself may take more than one form. Even if *Breed* v. *Jones* were held to be fully retroactive, it would still be required that each individual demonstrate that he was, in fact, subjected to a proceeding identical to that condemned in *Breed*, for no court has held that *Breed* proceedings were required in the Commonwealth, and petitioners (The Justices) have made no such concession. It is also entirely conceivable that this Court might rule that *Breed* should be applied retroactively only to those individuals who can establish not only that they were subject to *Breed* procedures, but that they were prejudiced by such proceedings. Clearly, then, the stay by its own terms would remain in effect until these matters were concluded. It is petitioners' contention that the only action which this Court might take which would render the decision on the issue of the stay advisory only is for this Court to deny certiorari in Case No. 76-6200, and for that reason petitioners have conditioned the granting of their cross-petition upon the granting of certiorari in Case No. 76-6200.

Therefore, petitioners suggest that so long as the question before the Court is one "that is appropriate for judicial determination," is "definite and concrete, touching the legal relations of parties having adverse legal interests" and is "a real and substantial controversy admitting of specific relief through a decree of a conclusive character," it is cognizable by this Court under the Constitution. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 241 (1937). The question raised in the cross-petition meets these criteria. No matter what conclusion is reached on the ultimate issue, this question is "of the type which is traditionally justiciable." *United States* v. *Nixon*, *supra*, 418 U.S. at 697.

Conclusion.

For the reasons stated above and in their petition, petitioners respectfully suggest that a writ of certiorari should be granted.

Respectfully submitted,

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